The Liberal Government Plans to Change Canada's Environmental Legislation?

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On February 8, 2018, Catherine McKenna, Minister of Environment and Climate Change tabled Bill C-69 (the "**Bill**"), *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*. The stated purpose of the Bill is to protect the environment and health and safety of Canadians, taking action consistent with achieving reconciliation with First Nations, the Metis and the Inuit, to build an early engagement and consultation process that is to include scientific knowledge, traditional knowledge of the Indigenous peoples of Canada and community consultation.

Most significantly, the Bill proposes to enact two new Acts, the *Impact Assessment Act* and the *Canadian Energy Regulator Act*, and to repeal the *Canadian Environmental Assessment Act*[1] and the *National Energy Board Act*, respectively. This summary will highlight the major legislative changes between the proposed Acts and the current Acts and identify some of the implications such changes may have.

Impact Assessment Act ("IAA")

Purpose and Overview

The stated purpose of the *IAA* includes the stated purpose of the *CEAA* but also includes greater recognition for the rights of the Indigenous peoples of Canada and an aim of ensuring that an impact assessment takes into account scientific information, traditional knowledge of the Indigenous peoples of Canada and community knowledge. The proposed Act provides broad discretionary powers to the Minister. The Minister may designate a physical activity as a "designated physical activity", even if not mandated by the regulations if the Minister believes that the carrying out of that physical activity may cause adverse effects.[2] In other words, the Minister has discretion to determine whether an assessment is required for any physical activity.

Participation

Although the *CEAA* contained some opportunities for public participation in environmental assessments,the proposed Act mandates greater initial consultation in the planning phase of the impact assessment. The new Impact Assessment Agency

(the "**Agency**") must ensure that the public is provided with an opportunity to participate in preparation for a possible impact assessment of a designated project,[3] and the Agency must offer to consult with any jurisdiction that has powers in relation to an impact assessment and any Indigenous group that may be affected by the project.[4]

Consultation with any jurisdiction includes the government of a province, a federal authority, any agency that is established under an Act of a province, or an Indigenous governing body that has powers, duties, or functions in relation to an assessment of the environmental effects of a project. The Agency or the Minister (in the case of referral to a review panel) must offer to consult and cooperate with such jurisdictions.

Requirement of an impact assessment

The *CEAA* contained factors that must be considered by the Agency when determining whether an environmental assessment was required. The proposed Act contains additional factors with respect to considerations that must be taken when the Agency is determining whether an impact assessment is necessary. Specifically, the Agency must consider any adverse impact that the project may have on rights of Indigenous peoples of Canada affirmed by section 35 of the *Constitution Act*, 1982 and any study conducted or plan prepared by a jurisdiction with respect to a region related to the designated project.[5] Upon deciding that an impact assessment is required, the Agency must provide the proponent with a notice of commencement of the impact assessment outlining the necessary information to complete the assessment within 180 days of posting the description of the designated project.[6] The information provided in the notice of commencement must be provided to the Agency within three years after the day on which the notice of commencement is posted on the website.

Impact assessment report – considerations

With respect to the assessment itself, the proposed Act includes the following additional factors that must be taken into account as part of an impact assessment by the Agency:

- impact on any Indigenous group and any adverse impact on the rights of indigenous peoples of Canada affirmed by section 35 of the *Constitution Act*;
- traditional knowledge of the Indigenous peoples of Canada with respect to the project;
- the extent to which the designated project contributes to sustainability;
- the extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and commitments in respect of climate change;
- considerations related to Indigenous cultures raised with respect to the project;
- community knowledge provided with respect to the project;
- comments from a jurisdiction received in the course of consultations;
- any assessment of the effects conducted on behalf of an Indigenous governing body; and
- the intersection of sex and gender with other identity factors.[7]

The scope of the factors is determined by the Agency or the Minister if the impact assessment is referred to a review panel.

Under the proposed Act, the Agency cannot conduct assessments respecting designated projects that are also regulated by either the *Nuclear Safety and Control Act* or the *Canadian Energy Regulator Act*. Such matters must be sent directly to a review panel and there are specific duties enumerated for each of these regulators under the proposed Act.[8]

Protection and preservation of traditional knowledge is also contained in the proposed Act, in that any traditional knowledge of the Indigenous peoples of Canada that is provided in confidence to the Regulator under the Act is confidential and must not knowingly be or permitted to be disclosed without written consent.[9]

With respect to penalties, the new Act provides for minimum fines when an individual or a corporation commits an offence under the Act. The *CEAA* does not contain minimum fines.

Appeals

The appeal process under the proposed Act has not changed from the *CEAA*. If written notice of appeal is provided within 30 days after the day on which written reasons are provided for a decision by the designated officer, the party to whom the decision or order was directed may appeal to the Federal Court.

Important timelines

The proposed Act, in the interest of expediency has implemented timelines by which certain activities mandated by the Act must be completed:

- Where an impact assessment is required, the Agency must provide the proponent of the project a notice of commencement containing assessment requirements within **180 days**. The Minister has the authority to extend the time limit by any period up to a maximum of **90 days**;
- The Agency must finalize the impact assessment report and submit it to the Minister no later than **300 days** after the date on which the notice of commencement was posted. The Minister has the authority to extend this timeline up to maximum of **90 days**;
- If the Minister is of the opinion that it is in the public interest to refer the impact assessment to a review panel, she must do so within **45 days** of the notice of commencement being posted;
- If the impact assessment is referred to a review panel, the review panel must submit a report to the Minister no later than **600 days** after the day on which the minimum number of members are appointed to the panel;
- The Minister must issue a decision statement no later than **30 days** after the day on which the report with respect to the impact assessment is posted;

Interaction with the National Energy Board ("NEB")

For projects that include activities regulated under the *Canadian Energy Regulator Act*, the review panel may exercise powers conferred on the Commission (as defined in the *Canadian Energy Regulator Act*. Under the new *Canadian Energy Regulator Act*, if an application to the Regulator (hereinafter defined) for a certificate relates to a

designated project and subject to an impact assessment per the Act, the Commission's powers, duties and functions to prepare a report and submit it to the Minister, are to be performed with the review panel as described in the *Impact Assessment Act*. The report is to contain a recommendation as to whether or not the certificate should be issued in respect of a pipeline.

Current Assessments

Depending on what stage of the assessment a proponent is at will determine whether the assessment shall be continued under the former *CEAA* or the new *IAA.* If the Agency has not collected the necessary information or studies required by the former *CEAA* before the day on which the new *IAA* comes into force, the Agency is deemed to have provided the proponent a notice of commencement, and the assessment shall continue as an impact assessment under the *IAA.*

Canadian Energy Regulator Act ("CERA")

Structure

Under the new *CERA*, a new corporation would be established called the Canadian Energy Regulator (the "**Regulator**"). The Regulator's mandate is to make transparent decisions, orders and recommendations with respect to pipelines, power lines, off-shore renewable energy projects and abandoned pipelines; to oversee the construction, operation and abandonment of pipeline and interjurisdictional powerlines; to advise and report on energy matters and to provide alternative dispute resolution processes. The board of directors of the Regulator will be composed of five to nine directors, one of whom must be an Indigenous person.[10]

The Regulator is to have a Commission of up to seven full-time commissioners, one of whom must be an Indigenous person.[11] The Commission, like the current NEB, is proposed to be a court of record and would have all the powers, rights and privileges vested in a superior court of record with respect to any matters within its jurisdiction.[12] The Commission would have the power to inquire into, hear and determine any matter under the Act on its own initiative. Under the proposed Act, the Commission must issue written reasons for each recommendation it makes to the Governor in Council or the Minister, and each decision or order it makes.[13]

Duty to consider

Pursuant to the proposed Act, the Commission has a duty to consider any adverse effects that the decision, order or recommendation may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982. Further, any traditional knowledge of the Indigenous peoples of Canada that is provided in confidence to the Regulator is confidential and must not knowingly be disclosed without written consent.[14]

Abandonment of facilities

The new Act would enact specific legislative provisions with respect to the operation and abandonment of regulated facilities. Specifically, the Commission may, by order, direct the holder to repair, reconstruct or alter part of the regulated facility and direct that

the affected part of the regulated facility not be used or be used in accordance with any conditions until the work is done.[15] The Regulator may make regulations respecting the design, construction and operation of pipelines and international powerlines, the abandonment of pipelines, respecting surveillance or monitoring of pipelines, respecting abandoned facilities.

The new Act also contains a section dedicated to regulating the abandonment of pipelines. Under that section, a company must not abandon a pipeline unless it obtains an order from the Commission, granting it leave to do so. If a company submits an application to abandon a pipeline, there are requirements to notify owners of lands and hold a public hearing should there be opposition to the abandonment. The company's liability for the abandoned pipeline continues even after leave to abandon has been granted by the Commission.[16]

Under the new Act, the Orphan Pipelines Account shall be established in the accounts of Canada.[17] The surplus generated from an abandoned pipeline shall be calculated in accordance with the Act and subsequent regulations, and paid into the Consolidated Revenue Fund to be credited to the Orphan Pipelines Account, if the Commission considers it appropriate.

Commission's Report

As is the case with the NEB, if the Commission is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall make a report to the Minister containing its recommendation as to whether or not the certificate should be granted. The new legislation requires that the Commission make more extensive considerations than the Board had to under the NEB Act. These additional considerations include:

- the environmental effects, including any cumulative environmental effects;
- the safety and security of persons and the protection of property and the environment;
- the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
- the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
- the effects of the rights on the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*; and
- environmental agreements entered into by the Government of Canada.[18]

As was the case with the NEB Act, the Governor in Council must direct the Commission, by order, as to whether or not a certificate be issued.[19]

A person must not carry on any work or activity to carry on any work related to an offshore renewable energy project or an offshore power line unless that person has been issued authorization by the Commission.[20] Further, the Governor in Council may make regulations respecting offshore renewable energy projects and offshore powerlines.[21]

With respect to lands, the NEB Act stated that consent of Cabinet was required where a company was to occupy or take possession of lands in a First Nations reserve. The new Act removes this power from Cabinet, and instead requires consent of the council of the

band when a company is seeking to take possession of, use or occupy lands in a reserve.[22]

Final decision maker

As mentioned, pipeline projects that require an impact assessment under the *IAA* are referred to the review panel formed under the *IAA*, and a report is delivered to the Minister containing a recommendation. Under the new *CERA*, Cabinet has authority to direct the Commission to approve, deny, or reconsider the application for a certificate or any of its conditions and send back to Cabinet for reconsideration.

Appeals

Appeals from decisions of the designated officer may be brought before the Commission and the Commission has the authority to dismiss or allow the appeal. An appeal from a decision of the Commission on a question of law or jurisdiction only may be brought before the Federal Court of Appeal with the leave of that Court. Leave to appeal must be sought within 30 days after the date of the decision or order appealed from. The new Act would further require that an appeal be brought within 60 days after the day on which leave to appeal is granted.[23]

Under the Act, proponents may make an application for judicial review with respect to any order made by Cabinet by making an application for leave to the Federal Court of Appeal.

Timelines

- Reports of the Commission with respect to the granting of certificates must be submitted to the Minister by a time specified by the Lead Commissioner, which must be no longer than **450 days**;
- An order must be made by Cabinet, directing the Commission with respect to the approval, denial or reconsideration of a certificate within **90 days** after the day on which the report is submitted to Cabinet;
- The Commission must comply with Cabinet's order regarding an application for a certificate within **7 days** after the day on which it is made;
- The Commission must decide on whether a licence for the exportation of oil and gas shall be issued within **180 days** after the day the applicant has submitted a complete application.

Current Projects

Certificates, licenses and permits issued by the NEB shall continue and unless suspended or revoked under the *CERA*, shall remain in force as it would have had the *CERA* not come into force. Applications that are pending before the commencement day are to be taken up before the new Commission and continued in accordance with the old *National Energy Board Act.*

Summary

In summary, the Bill has largely expanded the scope of considerations that must be taken by both the Agency or the Regulator when considering and conducting impact assessments and issuing certificates to proponents. There has been broad implementation of consideration of the rights of the Indigenous peoples of Canada across both proposed Acts. The structure of the energy regulator in Canada is proposed to have a different structure administratively, but appears to in substance be the same, with Cabinet often having final decision making authority. The Bill has empowered the Minister and Cabinet to enact regulations to expand on some of the provisions in this Act, which will provide for further details to come.

1 SC 2012, c 19, s 52 ("***CEAA***").
2 S 9.
3 S 11.
4 S 12.
5 S 16(2).
6 S 18.
7 S 22.
8 Part 1, s 43.
9 Part 1, s 58.
10 Part 2, s 14.
11 Part 2, s 26(2).
12 Part 2, s 31.
13 Part 2, s 53, 63.
14 Part 2, s 58.
15 Part 2, s 95.
16 Part 2, s 241.
17 Part 2, s 246.
18 Part 2, s 183.
19 Part 2, s 186.
20 Part 2, s 297.
21 Part 2, s 312.
22 Part 2, s 317.
23 Part 2, s 72.

By

Alan Ross, Stephanie Savoie

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Centennial Place, East Tower
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T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

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200 Burrard Street
Vancouver, BC, Canada
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T 604.687.5744
F 604.687.1415

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Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
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Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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